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RECEIVED MAR 21 ✓
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5 *Attorneys for Defendants*

6 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**

7 **IN AND FOR THE COUNTY OF YAVAPAI**

9 JOHN B. CUNDIFF and BARBARA C.
10 CUNDIFF, husband and wife; BECKY NASH,
11 a married woman dealing with her separate
12 property; KENNETH PAGE and KATHRYN
PAGE, as Trustee of the Kenneth Page and
Catherine Page Trust,

13 Plaintiffs,

14 v.

15 DONALD COX and CATHERINE COX,
16 husband and wife,

17 Defendants.
18

Case No. CV 2003-0399

Division No. 1

**DEFENDANTS' RESPONSE TO, AND
MOTION TO STRIKE, PLAINTIFFS'
PLAN FOR JOINDER OF PROPERTY
OWNERS SUBJECT TO RESTRICTIVE
COVENANTS**

(Assigned to the Honorable David L. Mackey) ✓

(Oral Argument Requested)

19 Defendants, through counsel undersigned, hereby respond to Plaintiffs' Plan for Joinder of
20 Property Owners Subject to Restrictive Covenants ("**Plaintiffs' Plan**"). Review of Plaintiffs' Plan
21 reveals that it is anything but a "plan" to join the remaining owners of property ("**Absent Owners**")
22 in the portion of Coyote Springs Ranch subdivision governed by the Declaration of Restrictions
23 dated June 12, 1974, at issue in this case. Rather Plaintiff's Plan constitutes nothing more than a
24 Motion for Reconsideration of their failed efforts to sway this Court that the Absent Owners should
25 not be made parties under Rule 19(b), Ariz. R. Civ. P. Because Plaintiffs failed to comply with the
26 Court's March 10, 2008, Orders, this Court should strike Plaintiffs' Plan, dismiss this Case and
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28

1 award Defendants their attorneys' fees, costs and expenses incurred in having to defend this action
2 since 2003.

3
4 This Response is supported by the following Memorandum of Points and Authorities, the
5 Memorandum Decision issued by the Court of Appeals and the Court's August 23, 2007 Order, the
6 Court's March 10, 2008, record of the Nature of Proceedings and the Record on File, which shall be
7 incorporated by reference.
8

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. Plaintiffs Have Ignored This Court's Order Of Joinder Of The Absent Owners.**

11 In its Memorandum Decision in this case the Court of Appeals held specifically that (i) the
12 Defendants' Motion to Join Indispensable Parties Pursuant to Rule 19(a), Ariz. R. Civ. P., or, in the
13 Alternative, Motion to Dismiss Pursuant to Rule 12(b)(7), Ariz. R. Civ. P., ("**Defendants' Joinder**
14 **Motion**") was well founded and supported by Rule 19(a), Ariz. R. Civ. P., (ii) that a ruling in this
15 case on the issue of abandonment would affect the real property rights of the Absent Owners and (iii)
16 that the Absent Owners are necessary parties to this case as long as (a) they are subject to service
17 of process and (b) their joinder will not deprive this Court of jurisdiction. See Memorandum
18 Decision attached hereto as Exhibit "1" at ¶¶ 29, 32, 35 and 36. Plaintiffs did not appeal the
19 foregoing decisions and holdings to the Arizona Supreme Court despite having the right to do so.
20 Consistent with its holdings, Division One of the Court of Appeals Ordered this Court to "determine
21 on remand whether these parties are also indispensable under Rule 19(b)." Id. at ¶ 36. Again,
22 Plaintiffs did not appeal that Order to the Arizona Supreme Court.
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26 Accordingly, on August 23, 2007, this Court Ordered Plaintiffs to file their legal
27 memorandum setting forth their position that joinder is not feasible and that the Court should
28

1 proceed with this action without the Absent Owners participation based upon the factors set forth
2 in Rule 19(b), Ariz. R. Civ. P. See August 23, 2007, Notice Setting Briefing Schedule and Oral
3 Argument attached as Exhibit "2". Plaintiffs filed their legal memorandum on October 12, 2007.
4
5 Therein, Plaintiffs opposed joinder of the Absent Owners arguing virtually the same arguments they
6 have propounded in Plaintiffs' Plan. On March 10, 2008, the Court heard oral argument on
7 Plaintiffs' opposition to joinder of the Absent Owners during which Plaintiffs advised the Court that
8 they were not refusing to join the Absent Owners. Following that oral argument, the Court issued
9 the following Orders ostensibly determining that the Absent Owners were necessary parties and that
10 their participation in this case was required:
11

- 12 (i) "Plaintiffs shall join all landowners subject to the Declaration of Restrictions dated
13 June 12, 1974."
- 14 (ii) "[W]ithin 60 days of [March 10, 2008,] the Plaintiffs shall file a notice with this
15 Court that includes a map of the properties subject to the Declaration of Restrictions
16 as well as a list designating the parcel numbers as well as names and address of each
17 property owner."
- 18 (iii) "[U]pon filing that notice [referenced in (ii) above], the Plaintiff shall also file a plan
19 for joinder of all the property owners subject to the Declaration of Restrictions."

20 See March 10, 2008, Nature of Proceedings attached hereto as Exhibit "3" (emphasis added). In
21 making the foregoing Orders, the Court did not request that Plaintiffs provide further argument as
22 to why they believe the Absent Owners are not necessary parties to this case; nor did the Court invite
23 Plaintiffs to file a Motion for Reconsideration of their Rule 19(b) analysis and legal memorandum
24 filed on October 12, 2007, or to provide "an analysis of this Court's ability to proceed without the
25 necessity of joining any additional property owner." See Plaintiffs' Plan at p. 1:23-24.
26

27 Thereafter, on May 14, 2008, and despite having more than 60 days to comply with the
28 foregoing, Plaintiffs filed Plaintiffs' Plan in which they have completely ignored the Orders of this

1 Court. While they did provide an old map of the area, Plaintiffs did not provide a list of all of the
2 property owners. See Plaintiffs' Plan at p. 3, FN 3. Further, contrary to their statement in their
3 introductory paragraph that their "plan" includes a "procedural mechanism for joinder of [the Absent
4 Owners]", they provided nothing of the sort. Rather, Plaintiffs paid merely lip service (and
5 conflicting lip service at that) to the actual act of joining the Absent Owners, stating on Page 3 of
6 their memorandum that all of the Absent Owners should merely be joined as Plaintiffs¹ and then
7 stating on Page 8 of their memorandum that the Court, not Plaintiffs, should assume responsibility
8 for aligning the Absent Owners with either Plaintiffs or Defendants in this case. Plaintiffs' Plan is
9 completely devoid of the manner in which Plaintiffs will proceed to join the Absent Owners, the
10 process they will go through in determining the alignment of Absent Owners as either Plaintiffs or
11 Defendants, the logic and rationale for their proposed alignment, the manner and timing of service
12 of the Absent Owners and a proposal for applicable deadlines with respect to this case.

13
14 By any measurable standard, Plaintiffs failed to comply with the March 10, 2008, mandates
15 and Orders of this Court. It doing so, they have shown their true colors – namely that contrary to
16 their statement otherwise at the last hearing, Plaintiffs have no intention of joining the Absent
17 Owners and only wish to continue arguing that the Absent Owners should not be joined despite this
18 Court's Order that joinder must occur for this matter to move forward. Because the Plaintiffs did
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24 ¹In Plaintiffs' Plan, they make the following statement: "As a practical matter, Plaintiffs
25 propose that only in the event this Court renders findings and enters a ruling that these non-parties
26 be deemed indispensable, that joinder be accomplished by means of amendment to the current
27 complaint to include these individuals as plaintiffs to the instant action." See Plaintiffs' Plan at 3:13-
28 15. In reading that statement, it is obvious that despite the Court's Order that Plaintiffs' shall join
the Absent Owners, Plaintiffs still appear to be under the impression that the question of joinder
remains undecided, which is perplexing at best given the rather clear and unambiguous Orders of
this Court on March 10, 2008.

1 not comply with the Court's March 10, 2008, Orders, the Plaintiffs' Plan should be stricken. Further,
2 because it is rather apparent that Plaintiffs will not join the Absent Owners, this case should be
3 dismissed and Defendants awarded their attorneys' fees, costs and expenses incurred in having to
4 litigate this case since 2003.

6 **II. Plaintiffs Have Erroneously Concluded That The Absent Owners Are Not**
7 **Indispensible.**

8 Defendants will not belabor this Court, as Plaintiffs have, with re-argument on the issue of
9 joinder and indispensibility under Rules 19(a) or (b). Rather, we will simply incorporate by
10 reference our arguments set forth in Defendants' Response to Plaintiffs' Legal Memorandum Re
11 Joinder Under Rule 19 of All Coyote Springs Ranch Property Owners Subject to Recorded
12 Covenants, June 13, 1974, a copy of which is attached hereto as Exhibit "4", and will provide some
13 minor supplements thereto based upon the arguments made by Plaintiffs' in their "plan".

14 As noted above, the Court of Appeals has ruled already that the Absent Owners are necessary
15 parties to this case. The basis for that holding was that the outcome of this case could significantly
16 affect each of the Absent Owners and each of their respective real property rights by potentially
17 creating a patchwork of restrictive covenants. In this regard, the Court stated:

18 "Restrictions as to the use of land are mutual, reciprocal, equitable easements
19 in the nature of servitudes in favor of owners of other lots within the restricted area,
20 and constitute property rights which run with the land." *La Esperanza Townhome*
21 *Ass'n, Inc. v. Title Sec. Agency of Ariz.*, 142 Ariz. 235, 238, 689 P.2d 178, 181 (App.
22 1984) (quoting *Montoya v. Barreras*, 473 P.2d 363, 365 (N.M. 1970). **A ruling in**
23 **this case that the restrictions have been abandoned and are no longer enforceable**
24 **against the Coxes' property would affect the property rights of all other owners**
25 **subject to the Declaration.**

26 See Memorandum Decision at ¶ 32 (emphasis added).

27 [E]ven if a ruling in favor of the Coxes on their affirmative defense of
28 abandonment were to apply only to the Coxes' property, **all property owners rights**

1 would still be affected by the Coxes' continued use of their property, or by any future
2 use adverse to the restrictions. We have previously found that amendments to
3 covenants must apply to all property subject to them or not at all. *See La Esperanza*
4 *Townhomes*, 142 Ariz. at 238, 689 P.2d at 181; *Riley v. Boyle*, 6 Ariz.App. 523, 434
5 P.2d 525, 528 (1967). Similarly, ruling in favor of the Coxes in this case could
cause the same unintended "patchwork" of restrictions those cases sought to
avoid.

6 See Memorandum Decision at ¶¶ 35 (emphasis added).

7
8 Plaintiffs have argued that despite the Court of Appeals' holding, the Absent Owners should
9 not be joined. In doing so, Plaintiffs have completely ignored and disregarded the Court of Appeals'
10 concern for the patchwork of restrictions that could result should it proceed without the joinder of
11 the Absent Owners.

12 Plaintiffs acknowledged in Plaintiffs' Legal Memorandum Re Joinder Under Rule 19 of All
13 Coyote Springs Ranch Property Owners Subject to Recorded Covenants, June 13, 1974 ("**Plaintiffs'**
14 **Rule 19 Memo**"), it is the Absent Owners rights, not theirs or the Defendants, that must be
15 considered under Rule 19, Ariz. R. Civ. P. See Plaintiffs' Rule 19 Memo at 6:21-24. In considering
16 those Absent Owners' Rights, this Court must be guided by the idea that until they are joined, the
17 Absent Owners' legal rights and interests are worthy of protection. Hence the obligation of the Court
18 to act with "equity and good conscience" in deciding whether joinder is appropriate. On this point,
19 the State Bar Committee Note to the 1966 Amendment is instructive:
20
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22 The present rule, with its judicial gloss in terms of indispensable,
23 necessary, and proper parties, has proved confusing and difficult to
24 apply. The revision seeks to substitute practical procedures to deal
25 with problems where otherwise desirable joinder is difficult. At the
26 same time, it retains the basic principle that parties must be joined
where this is required by "equity and good conscience."
27
28

1 See Rule 19 State Bar Committee Note, 1966 Amendment citing Shields v. Barrow, 58 U.S. 130,
2 17 How. 130, 15 L.Ed. 158 (1855); Bolin v. Superior Court, 85 Ariz. 131, 333 P.2d 295 (1959);
3 Smith v. Rabb, 95 Ariz. 49, 386 P.2d 649 (1963); State of Washington v. U.S., 87 F.2d 421 (9th Cir.
4 1936) (emphasis added).

6 “An indispensable party has been defined as one whose presence in the suit is required ‘(1)
7 to protect an interest which the absentee has in the subject matter of the controversy which would
8 be materially affected by the judgment entered in his absence ...; (2) to reach a decision which will
9 protect the interests of those who are before the court ...; or (3) to enable the court to make a
10 complete determination of the controversy.’” In re Marriage of Degener, 458 N.E.2d 46, 48 (Ill.
11 1983) quoting Lain v. John Hancock Mutual Life Ins. Co., 398 N.E.2d 278 (Ill. 1979); see also, City
12 of Livermore v. Local Agency Formation Com., 184 Cal.App.3d 531, 544, 230 Cal.Rptr. 867, 874
13 (Cal.App. 1986) (“An indispensable party is defined as one ‘so situated that the disposition of the
14 action in his absence may ... as a practical matter impair or impede his ability to protect that
15 interest....’”). The purpose of Rule 19, Ariz. R. Civ. P., is, in part, to allow the court to “exercise
16 its power to align the parties and the issues presented in a single lawsuit in a way that will foster
17 judicial efficiency, while protecting against prejudice. Rule 19 seeks to preserve the autonomy of
18 the parties and serves to insure the presence of an ‘essential core’ of parties and issues, to avoid
19 multiplicity of suits.” County of Kaua’i v. Baptiste, 165 P.3d 916, 933 (Haw. 2007).

21 In this case, the Absent Owners have an interest in the subject matter of the controversy
22 before this Court. That interest is their real property rights that exist by virtue of the Declaration of
23 Restrictions. Clearly, “equity and good conscience” dictate that this Court consider that a ruling in
24 Defendants’ favor on the issue of abandonment would result in stripping significant and material real
25

1 property rights away from the Absent Owners and the creation of a patchwork of restrictions,
2 restrictions that the Absent Owners could not thereafter enforce against the Defendants. Further, in
3 creating such a patchwork of restrictions, the Court would violate the long-standing all or none
4 principal that applies to restrictive covenants that, under the law in Arizona, the Absent Owners have
5 a right to expect. See La Esperanza Townhomes, 142 Ariz. 235, 238, 689 P.2d 178, 181 (Ct.App.
6 1984) and Riley v. Boyle, 6 Ariz.App. 523, 434 P.2d 525, 528 (1967). The Absent Owners are part
7 of the “essential core” of people that, under Rule 19, this Court must ensure have their say on the
8 issue of abandonment lest they lose real property rights without any voice in that judicial
9 determination. Accordingly, as this Court already had determined, the Absent Owners must be
10 joined.

11
12 Based on the foregoing, the Court should strike Plaintiffs’ Plan, dismiss this case and award
13 Defendants their attorneys’ fees, costs and expenses. In the alternative, the Court should adopt
14 Defendants’ plan set forth below, *infra*.

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17 **III. Defendants’ Proposed Plan for Joinder.**

18
19 In the event this Court elects to not dismiss this case as requested, Defendants propose the
20 following procedure for joining the Absent Owners. First, Plaintiffs must provide a complete list
21 of all of the Absent Owners, not just some of them. Thereafter, Plaintiffs and Defendants should
22 each submit a list of which of the Absent Owners they believe should be aligned with Plaintiffs and
23 which should be aligned with Defendants. For those Absent Owners in which the parties are in
24 agreement as to their alignment, the Complaint should be amended accordingly, naming these Absent
25 Owners as involuntary Plaintiffs or involuntary Defendants accordingly.
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1 For those Absent Owners on which agreement cannot be reached, the Court should conduct
2 an evidentiary hearing at which each party shall present their evidence supporting their position as
3 to alignment after which the Court will render its determination. Thereafter, the Complaint should
4 be amended accordingly to align these Absent Owners as involuntary Plaintiffs or involuntary
5 Defendants.
6

7 Following the alignment of the Absent Owners, the amended Complaint should be served
8 on all of the Absent Owners in accordance with Rules 4.1 and 4.2, Ariz. R. Civ. P. Within 45 days
9 following service, this Court should conduct a case management conference for purposes of
10 determining a trial schedule along with applicable discovery deadlines.
11

12 The foregoing should provide ample time to complete joinder of the Absent Owners and
13 provide the backdrop and appropriate schedules for all present and future parties to prepare this case
14 for a trial.
15

16 **IV. Conclusion.**

17 It is rather clear that Plaintiffs do not want their neighbors to be joined in this case. Their
18 “plan” is the best evidence of that fact. However, the Court of Appeals and this Court have each
19 determined that the Absent Owners are necessary to the full and final resolution of this case.
20 Accordingly, this Court ordered the joinder of the Absent Owners and ordered the Plaintiffs to
21 provide the Court with a plan for doing so. Plaintiffs failed in this regard and instead chose to re-
22 argue their position that joinder is not necessary. Therefore, their “plan” should be stricken. Further,
23 because it is apparent Plaintiffs will not join the Absent Owners, this case should be dismissed with
24 prejudice and Defendants awarded their attorneys’ fees, costs and expenses. In the event the Court
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1 does not dismiss this case, the Absent Owners should be joined using the plan proposed by
2 Defendants herein.

3
4 RESPECTFULLY SUBMITTED this 25 day of May, 2008.

5 ADAMS & MULL, PLLC

6
7 By 

8 Jeffrey R. Adams
9 Attorneys for Defendants

10 COPY of the foregoing hand-delivered
11 this 28 day of May, 2008, to:

12 Honorable David L. Mackey
13 Yavapai County Superior Court
14 Division 1
15 Yavapai County Courthouse
16 Prescott, Arizona 86301

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24
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26
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DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED

MAY 24 2007

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PHILIP G. URRY, CLERK
By MEX

JOHN B. CUNDIFF and BARBARA C.)	1 CA-CV 06-0165
CUNDIFF, husband and wife; BECKY)	
NASH, a married woman dealing)	DEPARTMENT D
with her separate property;)	
KENNETH PAGE and KATHRYN PAGE,)	MEMORANDUM DECISION
as Trustees of the Kenneth Page)	(Not for Publication -
and Kathryn Page Trust,)	Rule 28, Arizona Rules
)	of Civil Appellate
Plaintiffs/Appellants/)	Procedure)
Cross Appellees,)	
)	
v.)	
)	
DONALD COX and CATHERINE COX,)	
husband and wife,)	
)	
Defendants/Appellees/)	
Cross Appellants.)	
)	

Appeal from the Superior Court in Yavapai County

Cause No. CV2003-0399

The Honorable David L. Mackey, Judge

AFFIRMED IN PART; REVERSED IN PART; REMANDED

Favour Moore & Wilhelmsen, PA	Prescott
By David K. Wilhelmsen	
Marguerite A. Kirk	
Attorney for Plaintiffs/Appellants/Cross Appellees	

Musgrove, Drutz & Kack	Prescott
By Mark W. Drutz	
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W I N T H R O P, Presiding Judge

¶1 John and Barbara Cundiff, Elizabeth Nash, and Kenneth and Kathryn Page (collectively "Cundiffs") filed a complaint for declaratory and injunctive relief against Donald and Catherine Cox (collectively "Coxes") alleging the Coxes were in breach of restrictive covenants applicable to the Coxes' property. Following the Coxes' motion for partial summary judgment, the trial court entered partial final judgment pursuant to Arizona Rules of Civil Procedure Rule ("Rule") 54(b), and awarded the Coxes approximately \$88,000.00 in attorney fees. Both parties have appealed. For the following reasons, we affirm in part, reverse in part, and remand this matter for further proceedings.

Facts and Procedural Background

¶2 The parties own property in an area known as Coyote Springs Ranch. The Coxes use their property ("subject property") as a "growing yard" for Prescott Valley Nursery and Prescott Valley Growers, the retail and wholesale nursery business they own in partnership with their two sons. Catherine Cox described the subject property in her deposition testimony as one of "three locations" for the partnership. It is used to grow and store inventory for the other two locations that are outside of Coyote Springs Ranch. Partnership employees work at the subject property, but it is not open to the public, and no sales are conducted on it. The Coxes also live on the property part time.

¶3 In 2001, the Coxes applied for an agricultural use exemption for the property from Yavapai County. As part of the application for the exemption, Catherine Cox signed a Statement of General Agricultural Use and Affidavit, acknowledging:

The exemption for general agricultural purposes is an exemption from zoning regulations for the agricultural use of the land and any residential use thereof shall be customarily incidental to the established agricultural use. The primary use, therefore, is a[n] "agricultural use." When the "agricultural use" is abandoned the zoning district regulations shall again be fully applied.

Any residential use of this property is secondary and must be an accessory use to the principle agricultural use as stated above. Should the property be used for any use not customarily incidental to the agricultural use, the exemption clause shall no longer apply.

"Agricultural Property" is defined in the Statement as:

property used for the purpose of agronomy, horticulture or animal husbandry:

1. In which the primary function is to produce an agricultural crop or commodity.
2. In which the primary investment is for the purpose of farming or stock ranching.
3. In which the property is capable of being utilized solely for it's [sic] agricultural abilities to sustain economic self-sufficiency and return a nominal profit.

¶4 Coyote Springs Ranch property is subject to a Declaration of Restrictions ("Declaration") that provides in relevant part:

1. Each and every parcel of the above-described premises shall be known and described as residential parcels; that is to say, mobile,

modular or permanent dwellings may be erected and maintained upon said premises, subject to limitations with respect thereto as herinbelow [sic] set forth.

2. No trade, business, profession or any other type of commercial or industrial activity shall be [initiated] or maintained within said property or any portion thereof.

.

19. If there shall be a violation or threatened or attempted violation of any of said covenants, conditions, stipulations or restrictions, it shall be lawful for any person or persons owning said premises or any portion thereof to prosecute proceedings at law or in equity against all persons violating or attempting to, or threatening to violate any such covenants, restrictions, conditions or stipulations, and either prevent them or him from so doing or to recover damages or other dues for such violations. No failure of any other person or party to enforce any of the restrictions, rights, reservations, limitations, covenants and conditions contained herein shall, in any event be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof

¶15 In their complaint against the Coxes, the Cundiffs alleged that the Coxes' use of the subject property violates section two of the Declaration. In response, the Cundiffs asserted the defenses of abandonment, waiver, estoppel, laches and unclean hands.

¶16 The Cundiffs filed two motions for partial summary judgment—one asserting that the Coxes' waiver defense was precluded by section nineteen of the Declaration, and another arguing that the Coxes' use of the subject property violates

section two of the Declaration and that the Coxes could not prove their defenses of estoppel, laches, and unclean hands.

¶7 The trial court denied the motion for summary judgment on the waiver issue because it found "a material factual issue regarding whether the restrictions . . . [had] been so thoroughly disregarded as to result in a change in the area that destroys the effectiveness of the restrictions, defeats the purposes for which they were imposed and amounts to an abandonment of the entire Declaration of Restrictions." The court reasoned that, if the entire Declaration had been abandoned, section nineteen, on which the Cundiffs based their anti-waiver argument, would also have been abandoned.

¶8 Regarding the Cundiffs' second motion for partial summary judgment, the trial court stated:

Plaintiffs seek summary judgment regarding the Defendants [sic] affirmative defenses of estoppel, laches and unclean hands. This motion also seeks a legal determination that the Declaration of Restrictions contains an unambiguous and enforceable provision prohibiting trade, business, industrial or commercial use. For the reasons set forth above, there is a material factual dispute regarding the enforceability of the terms in the Declaration of Restrictions. The issue of abandonment will have to be litigated before the Court will be in [a] position to decide the enforceability of any term of the restrictive covenants. The Plaintiffs are not entitled to such a summary determination. However, the facts upon which the Defendants rely to support their affirmative defenses do not rise to estoppel, laches and unclean hands as a matter of law. There are no material factual issues that preclude summary judgment in favor of the Plaintiffs on the

affirmative defenses of estoppel, laches and unclean hands.

The trial court, therefore, granted the motion as to the defenses of estoppel, laches and unclean hands, but denied it "to the extent" it sought "summary declaration as to the enforceability of the Declaration of Restrictions."

¶9 Within forty days of the existing trial date, the Coxes filed a motion entitled "Motion to Join Indispensable Parties Pursuant to Rule 19(A), Ariz. R. Civ. P., or, in the Alternative, Motion to Dismiss Pursuant to rule 12(b)(7), Ariz. R. Civ. P., for Failure to Join Indispensable Parties" ("motion for joinder"). The trial court denied the motion for joinder stating it was "not well founded" and "untimely."

¶10 The Coxes also filed a motion for partial summary judgment arguing that their use of the subject property was "agricultural" and, therefore, did not violate the restriction barring trade, business, professional, or other industrial or commercial activity. The trial court granted that motion, explaining its ruling as follows:

In construing the language of a contract, the court has to consider the entire contract, and I have reviewed the entire Declaration of Restrictions, including language in Paragraph 3 that provides that these are all over nine acre parcels that are governed by these declarations, that outbuildings can be -necessary outbuildings can be erected pursuant to Paragraph 7(e), and then I look to the case law that provides that, for one, restrictions are not favored and restrictions must be strictly construed.

Considering the size of the parcels and the types of activities that would typically go on on parcels of this size, I find as a matter of law that the conduct of the Coxes on this parcel does not violate Paragraph 2 of the Declaration of Restrictions, as it is not a trade, business or profession or any other type of commercial or industrial activity initiated or maintained within said property or any portion thereof.

The trial court entered partial judgment in favor of the Coxes on all counts in the complaint relying on the Coxes' alleged violation of section two of the Declaration. The parties agreed this ruling was critical to the remaining issues, and agreed to a form of judgment which could be immediately reviewed on appeal.

Cundiffs' Appeal

¶11 The Cundiffs appeal from the judgment arguing that the trial court erroneously interpreted section two of the Declaration. They also contend the trial court erroneously awarded Coxes their costs and attorney fees. We review a trial court's grant of summary judgment *de novo* to determine whether any genuine issue of material fact exists and whether the moving party was entitled to judgment as a matter of law. *Salib v. City of Mesa*, 212 Ariz. 446, 450, ¶ 4, 133 P.3d 756, 760 (App. 2006); see also Ariz. R. Civ. P., 56(c)(1). We view the facts and all reasonable inferences therefrom in the light most favorable to the party against whom summary judgment was granted. See *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003).

¶12 "A deed containing a restrictive covenant that runs with the land is a contract." *Powell v. Washburn*, 211 Ariz. 553, 555, ¶ 8, 125 P.3d 373, 375 (2006); see also *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 634, ¶ 5, 2 P.3d 1276, 1279 (App. 2000). "The interpretation of a contract is generally a matter of law." *Powell*, 211 Ariz. at 555, ¶ 8, 125 P.3d at 375. Thus, we are not bound by the trial court's interpretation of the restrictions at issue here.

¶13 The trial court interpreted existing Arizona case law to hold that restrictions are not favored and must be strictly construed. However, the trial court did not have the benefit of the Arizona Supreme Court's most recent pronouncement in this area. In *Powell*, our Supreme Court rejected the very rule of construction utilized by the trial court. In that case, the court noted that some Arizona decisions have referred to a policy of construing restrictive covenants strictly in favor of the free use of land, but that such references appear exclusively in dicta. *Powell*, 211 Ariz. at 557, ¶ 15, 125 P.3d at 377. The court stated the "cardinal principle in construing restrictive covenants is that the intention of the parties to the instrument is paramount." *Powell*, 211 Ariz. at 556, ¶ 9, 125 P.3d at 376 (quoting *Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 449, 868 P.2d 1030, 1032 (App. 1993)). The court then adopted the construction approach set forth in Section 4.1(1) of the

Restatement (Third) of Property (Servitudes): "A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." *Powell*, 211 Ariz. at 557, ¶ 13, 125 P.3d at 377.

¶14 In this case the Declaration does not define the terms "business" or "commercial" used in section two of the restrictions. However, "[w]ords in a restrictive covenant must be given their ordinary meaning, and the use of the words within a restrictive covenant gives strong evidence of the intended meaning." *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, 396, ¶ 13, 87 P.3d 81, 84 (App. 2004); see also *Chandler Med. Bldg. Partners v. Chandler Dental Group*, 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993) ("The controlling rule of contract interpretation requires that the ordinary meaning of language be given to words where circumstances do not show a different meaning is applicable.").

¶15 Nothing in the record suggests a specialized meaning for the words "business" and "commercial" in the Declaration, and the ordinary meaning of these terms will be utilized in characterizing the activity that is undisputedly occurring on the subject property. Although no sales occur on the property, the Coxes admit that the property is used as a tree and shrub farm to

grow and store inventory for their retail and wholesale nursery business.

¶16 The Coxes contend the presence of the nursery inventory on their property is no different than elaborate residential landscaping; however, they do not contest the Cundiffs' description of the inventory kept on the property. Relying on invoices contained in the record, the Cundiffs state that, from January to September, 2002 "Cox purchased and maintained on the Coyote Springs property" 2,777 five-gallon trees, 1,589 fifteen-gallon trees, and 2,013 box trees, fruit trees and shrubs. From January to November 2003, Cundiff states "Cox purchased for production on the subject property" 1,943 five-gallon trees, 2,730 fifteen-gallon trees, 34 twenty-gallon trees and 1,919 box trees, fruit trees and shrubs.

¶17 The Coxes' tree farm is clearly an agricultural business. But nothing in the Declaration suggests that any one type of business was intended to be excluded from section two of the restrictions. On the contrary, the wording used in the restriction is broad, prohibiting any "trade, business, profession or any other type of commercial or industrial activity." Moreover, the trees and shrubs cultivated and stored on the property are grown and maintained there for business purposes. They are not landscaping.

¶18 Furthermore, application of the restriction to the Coxes' use of their property is consistent with the Declaration as a whole. See *Powell*, 211 Ariz. at 557, ¶ 16, 125 P.3d at 377 (quoting *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. Ct. App. 1993) ("Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein.")). Section one of the Declaration states: "Each and every parcel of the above-described premises shall be known and described as residential parcels" In her affidavit submitted for the Coxes' agricultural use exemption, Catherine Cox stated that the subject property is used only secondarily as residential property and principally to produce an agricultural crop or commodity. Interpretation of the restriction as the Coxes' urge—to allow agricultural production for business purposes as long as sales do not occur directly on the property—would defeat the residential character of the property obviously intended through the restrictions.

¶19 Finally, both parties rely on the affidavit of Robert Conlin, an original grantor responsible for preparation and recording of the Declaration. Conlin states:

3. The recorded covenants and restrictions were intended to ensure that the Coyote Springs Ranch subdivision would be a residential community. The nine-acre lots were intended to ensure that the residential community would retain a rural setting.

4. To protect the rural, residential setting of the subdivision, a covenant was included strictly prohibiting trade, business, commercial or industrial enterprises [from] operating in the Coyote Springs Ranch subdivision.

5. The covenant against trade, business, commercial or industrial enterprises was not intended to prohibit against landowners or occupiers from maintaining a home-office in their residence, from parking or maintaining their business vehicles or equipment on their property, or from indicating to the public that they had a home office at their residence.

6. I have personally viewed the nursery operation engaged in by Catherine and Donald Cox on their property located in Coyote Springs Ranch. As an original grantor and creator of the recorded Declarations of Restrictions, June 13, 1974, it was my intention that the restrictions prohibit the very activity being conducted on the property by Catherine and Donald Cox. Furthermore, the express language of the restrictions provide such.

Interpretation of the Declaration is an issue of law for the court. Therefore, to the extent Conlin's affidavit attempts to express a legal opinion, we disregard it. Limited to evidence of intent, however, the affidavit is relevant.

¶20 The Coxes seize on Conlin's use of the word "rural" to argue that the agricultural activity is typically found in rural settings. Therefore, they reason that their use of the property does not violate the intended purpose of the restriction. However, Conlin did not use that word in isolation, and it does not appear in the Declaration itself. As confirmed in Conlin's affidavit, the Declaration ensures not only a rural setting, but a rural, residential environment. Given that interpretation, the

Coxes' agricultural business use of the property violates section two of the Declaration.

¶21 Having concluded the trial court erred in interpreting the restriction at issue, we vacate the judgment and need not address the Cundiffs' argument regarding the amount of attorney fees awarded therein.

Coxes' Appeal

¶22 The Coxes appeal from the trial court's grant of summary judgment against them on their defenses of estoppel, laches and "unclean hands" and the trial court's denial of their motion for joinder. Initially, we note that the trial court's rulings on these motions are not themselves final judgments. We have jurisdiction to review the trial court's denial of the motion for joinder because the motion sought joinder as to claims for which the trial court has entered final judgment. See Arizona Revised Statutes ("A.R.S.") section 12-2102(A) (2003) (appellate court shall review "any intermediate orders involving the merits of the action and necessarily affecting the judgment, and all orders and rulings assigned as error"). Likewise, we address the Cundiffs' motion for summary judgment only regarding those claims resolved by the partial final judgment on review.

¶23 The Cundiffs asserted in their motion for summary judgment that insufficient evidence existed to prove the Coxes' equitable defenses. When a motion for summary judgment is made

and properly supported, "the adverse party's response, by affidavits or . . . otherwise, . . . must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Ariz. R. Civ. P. 56(e). A motion for judgment as a matter of law "should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). In this case, the Coxes did not present evidence in opposition to the motion for summary judgment that would allow a conclusion that the Cundiffs either acted or failed to act in such a manner as to prevent them from bringing their claim under any of the theories on which the Coxes rely.

¶24 "In order to establish equitable estoppel, a party must show: (1) affirmative acts inconsistent with a claim afterwards relied upon; (2) action by a party relying on such conduct; and (3) injury to the party resulting from a repudiation of such conduct." *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 537, ¶ 10, 96 P.3d 530, 535 (App. 2004). Laches "is an equitable counterpart to the statute of limitations, designed to discourage dilatory conduct." *Sotomayor*

v. Burns, 199 Ariz. 81, 83, ¶ 6, 13 P.3d 1198, 1200 (2000). "[It] will generally bar a claim when the delay is unreasonable and results in prejudice to the opposing party." *Id.* Under the doctrine of "unclean hands" a court may deny relief to a party whose conduct in relation to the controversy on which he or she has brought a claim for equitable relief has acted inequitably, himself or herself. See *Am. Credit Bureau, Inc. v. Carter*, 11 Ariz. App. 145, 147-48, 462 P.2d 838, 840-41 (1969).

¶25 In opposition to the Cundiffs' motion for summary judgment, the Coxes relied on their contentions that the Cundiffs had failed to file suit or otherwise complain about the Coxes' activity on the subject property until after the Coxes had invested a substantial amount of money in their growing operation. The Coxes stated that they had begun improvements on the property in 2000, that most of the improvements had been completed by 2002, but the Cundiffs did not complain or file suit until May 2003. By that time, the Coxes had expended over \$500,000.00 on the property.

¶26 The Coxes provided no evidence, however, as to when the improvements were visible on the property, when the Cundiffs knew or should have known the purpose of those improvements, or that the Cundiffs knew or should have known the expense the Coxes had incurred in making those improvements. As the Coxes concede, their first production of trees on the property did not begin

until 2002. By that time, the improvements had already been made, and the Cundiffs filed suit in May 2003. On this record, no reasonable fact-finder could find the elements necessary for the Coxes' estoppel or laches claims.

¶27 The Coxes base their claim for "unclean hands" on their allegations that Plaintiffs/Appellants Page and Nash "solicit business from an auto repair shop called Coyote Curt's located in Coyote Springs," and the fact that all Plaintiffs/Appellants "attend[ed] a meeting in 2003 at a church, another non-residential enterprise located within Coyote Springs, to discuss violations by other property owners, including ostensibly the Coxes." These actions, however, are not inequitable given the Cundiffs' claims in this case. We find no error in the trial court's grant of summary judgment in favor of the Cundiffs on the Coxes' affirmative defenses to their alleged violation of section two of the Declaration.¹

¶28 Lastly, we address the trial court's denial of the Coxes' motion for joinder. The trial court found the motion "untimely" and "not well founded." We review *de novo* questions involving interpretation and application of court rules. *Vega v. Sullivan*, 199 Ariz. 504, 507, ¶ 8, 19 P.3d 645, 648 (App. 2001).

¹ The Coxes also allege that the Cundiffs are in violation of the Declaration's restriction against above-ground water tanks, an allegation the Cundiffs have made against the Coxes on a claim not at issue in this appeal. Because the trial court's ruling on summary judgment as to the application of the Coxes' affirmative

¶29 Rule 19 does not include a time limit. The Cundiffs have not cited, nor have we found, a time requirement imposed by case law. Rule 12(h) states that "a defense of failure to join a party indispensable under Rule 19 . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." The Coxes' motion, therefore, was not untimely. Moreover, we determine it was well founded, in part.

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede the person's ability to protect that interest (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest.

Ariz. R. Civ. P. 19(a).

¶30 The Coxes argue, as they did below, that all owners of property subject to the Declaration must be joined as parties to this lawsuit because an issue in the case is whether the

defenses to that claim is not implicated by the court's partial final judgment, we do not address the issue here.

Declaration has been abandoned.² They argue that the other property owners have an interest in the enforceability of the restrictions in the Declaration and that the trial court's ruling on the abandonment issue may impair or impede the owners' ability to protect that interest under the doctrines of res judicata and collateral estoppel, and may subject them to inconsistent obligations.

¶31 The doctrines of res judicata and collateral estoppel bar the relitigation of claims or issues when certain prerequisites are met. Res judicata bars a subsequent claim by parties or their privies based on a cause of action already litigated. *In re Gen. Adjudication of all Rights to Use Water in Gila River Sys. & Source*, 212 Ariz. 64, 69-70, ¶ 14, 127 P.3d 882, 887-88 (2006). Three elements must be proved before the doctrine applies "(1) an identity of claims in the suit in which a judgment was entered and the [subsequent] litigation, (2) a final judgment on the merits in the previous litigation, and (3) identity or privity between the parties in the two suits." *Id.* Collateral estoppel, or issue preclusion, requires: "(1) the issue was actually litigated in [a] previous proceeding, (2) the

² The Coxes refer to parties necessary under Rule 19(a) as "indispensable" parties. However, "the court decides who is an indispensable party after it finds that the party is necessary but cannot be joined." *Gerow v. Covill*, 192 Ariz. 9, 14, ¶ 21, 960 P.2d 55, 60 (App. 1998). No evidence was presented below that the other property owners could not be joined if necessary. We, therefore, understand the Coxes' argument to be that the other owners are necessary, rather than indispensable, parties.

parties had a full and fair opportunity and motive to litigate the issue, (3) a valid and final decision on the merits was entered, [and] (4) resolution of the issue was essential to the decision." *Campbell v. SZL Properties, Ltd.*, 204 Ariz. 221, 223, ¶¶ 9-10, 62 P.3d 966, 968 (App. 2003). Further, if collateral estoppel is invoked offensively, by a "plaintiff seek[ing] to prevent [a] defendant from relitigating an issue the defendant previously litigated unsuccessfully" a fifth element, a common identity of the parties, is required. See *id.* at ¶ 10.

¶32 Because none of the absent property owners is a party to this action, the doctrines of res judicata and collateral estoppel could not be employed to limit their claims or defenses in a subsequent case. However, "[r]estrictions as to the use of land are mutual, reciprocal, equitable easements in the nature of servitudes in favor of owners of other lots within the restricted area, and constitute property rights which run with the land." *La Esperanza Townhome Ass'n, Inc. v. Title Sec. Agency of Ariz.*, 142 Ariz. 235, 238, 689 P.2d 178, 181 (App. 1984) (quoting *Montoya v. Barreras*, 473 P.2d 363, 365 (N.M. 1970)). A ruling in this case that the restrictions have been abandoned and are no longer enforceable against the Coxes' property would affect the property rights of all other owners subject to the Declaration.

¶33 In *Karner v. Roy White Flowers, Inc.*, 527 S.E.2d 40 (N.C. 2000), the Supreme Court of North Carolina determined that

all property owners subject to the restrictions at issue in that case were necessary parties in the plaintiffs' suit to enforce the restrictions because the defendant had asserted a change-of-circumstances defense. 527 S.E.2d at 436. That defense is, essentially, the abandonment defense the Coxes assert here.

¶134 The Cundiffs distinguish *Karner* on the basis that *Karner* applied a unique feature of North Carolina law that:

once a lot was released from a restrictive covenant, then the entire sub-division was so released; hence, all other property owners were to be joined to enable them to protect their property interest to enforce the covenants since the non-joined property owner[s] under North Carolina law could lose the right to enforce the covenant.

See *Karner*, 527 S.E.2d at 437 ("If the restrictive covenant is removed from a lot within a subdivision, that action extinguishes the restrictive covenant on all properties within the subdivision."). The Cundiffs argue that Arizona has no such rule of law; therefore, the holding in *Karner* should not apply.

¶135 However, even if a ruling in favor of the Coxes on their affirmative defense of abandonment were to apply only to the Coxes' property, all property owners rights would still be affected simply by the Coxes' continued use of their property, or by any future use adverse to the restrictions. We have previously found that amendments to covenants must apply to all property subject to them or not at all. See *La Esperanza Townhomes*, 142 Ariz. at 238, 689 P.2d at 181; *Riley v. Boyle*, 6

Ariz. App. 523, 526, 434 P.2d 525, 528 (1967). Similarly, ruling in favor of the Coxes in this case could cause the same unintended "patchwork" of restrictions those cases sought to avoid.

¶36 We conclude that the absent property owners are necessary parties given the issue to be decided in this case. Under the rule, necessary parties must be joined if they are "subject to service of process and . . . [their joinder] will not deprive the court of jurisdiction over the subject matter of the action." Ariz. R. Civ. P. 19(a). The trial court must determine on remand whether these parties are also indispensable under Rule 19(b).

Conclusion

¶37 The judgment is vacated. The trial court's grant of summary judgment on the Coxes' affirmative defenses of estoppel, laches and "unclean hands" is affirmed. This matter is remanded for further proceedings consistent with this decision. In our discretion, both parties' requests for attorney fees are denied. Further, in light of our disposition of the issues, we determine that the parties will bear their own costs on appeal.


LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:


SUSAN A. EHRLICH, Judge


SHELDON H. WEISBERG, Judge

SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI

<p>JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife; BECKY NASH, a married woman dealing with her separate property; KENNETH PAGE and KATHRYN PAGE, as Trustee of the Kenneth Page and Catherine Page Trust,</p> <p align="right">Plaintiff,</p> <p align="center">-vs-</p> <p>DONALD COX and CATHERINE COX, husband and wife,</p> <p align="right">Defendant.</p>	<p>Case No. CV2003-0399</p> <p>NOTICE SETTING BRIEFING SCHEDULE AND ORAL ARGUMENT</p>	<p align="center">FILED</p> <p>DATE: <u>AUG 24 2007</u> ✓</p> <p><u>12</u> O'Clock <u>PM</u> .M.</p> <p align="center">JEANNE HICKS, CLERK</p> <p>BY: <u>S. S. [Signature]</u> Deputy</p>
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<p>HONORABLE DAVID L. MACKEY</p> <p>DIVISION 1</p>	<p>BY: Cheryl Wagster Judicial Assistant</p> <p>DATE: August 23, 2007</p>
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The Court has considered the Defendants Notice of Lodging Judgment On Mandate, Plaintiffs' Objection To Cox's Lodged Form Of Judgment On Mandate and Defendant's Response. The Court notes that oral arguments have been requested. The Court pursuant to Rule 7.1(c)(2), Ariz.R.Civ.P. has determined that oral argument will not assist the Court in the determination of this motion.

The Court declines to sign the form of Judgment on Mandate lodged by the Defendants. First, it is unnecessary. The Court of Appeals did not remand the case with a direction that the Judgment be vacated. The Court of Appeals already Ordered that the Judgment against the Plaintiffs is vacated. An Order from this Court is not warranted.

Next, the lodged form of Judgment on Mandate misinterprets the Court of Appeals decision. The Court of Appeals in essence granted the Defendants' Motion For Joinder finding that "the absent property owners are necessary parties given the issue to be decided in this case." The Court of Appeals directed that "[t]he trial court must determine on remand whether these parties are also indispensable under Rule 19(b)."

The Court of Appeals did not direct who should join "the absent property owners". They are not joined at this point. Therefore, the question for this Court is whether this action can proceed without "the absent property owners". Rule 19(b), Ariz.R.Civ.P. provides the Court with the factors that must be considered in determining whether the action can proceed in the absence of necessary parties. This Court finds that the Plaintiffs bear the burden of establishing that joinder is not feasible and that the Court should proceed with this action based upon the factors set forth in Rule 19(b), Ariz.R.Civ.P.

AUG 24 2007

Cundiff v. Cox
CV2003-0399
Page Two
August 23, 2007

THEREFORE, IT IS ORDERED Plaintiffs shall have until **September 24, 2007** to file a legal memorandum setting forth their position that joinder is not feasible and that the Court should proceed with this action based upon the factors set forth in Rule 19(b), Ariz.R.Civ.P.

IT IS ORDERED Defendants shall have until **October 22, 2007** to file a response to Plaintiffs' memorandum.

IT IS ORDERED Plaintiffs shall have until **November 5, 2007** to file a reply.

IT IS ORDERED continuing the Pretrial Conference previously set by the Court and setting Oral Arguments on the issues set forth in the briefing on **Tuesday, November 20, 2007 at 9:00 a.m. with one hour allotted.** By this ruling, the Court does not foreclose the very real possibility that an evidentiary hearing may ultimately be necessary to resolve whether "the absent property owners" are "indispensable under Rule 19(b)."

cc: David K. Wilhelmsen – Favour Moore & Wilhelmsen, P.O. Box 1391, Prescott, AZ 86302
Mark W. Drutz/Jeffrey Adams/Sharon Sargent-Flack – Musgrove, Drutz & Kack,
1135 Iron Springs Road, Prescott, AZ 86302

COPY

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

FILED
DATE: March 10, 2008
10:08 O'Clock A
JEANNE HICKS, CLERK
BY: Lilly Miller
Deputy

DIVISION 1

JEANNE HICKS, CLERK

HON. DAVID L. MACKEY

BY: Lilly Miller, Deputy Clerk

CASE NO. CV 2003-0399

DATE: March 10, 2008

TITLE:

COUNSEL:

JOHN B. CUNDIFF and BARBARA C.
CUNDIFF, husband and wife; BECKY NASH, a
married woman dealing with her separate
property; KENNETH PAGE and KATHRYN
PAGE, as Trustee of the Kenneth Page and
Catherine Page Trust,
Plaintiffs,

David K. Wilhelmsen, Esq.
Marguerite Kirk, Esq.
FAVOUR, MOORE & WILHELMSSEN, PA

(For Plaintiffs)

-vs-

DONALD COX and CATHERINE COX,
husband and wife,
Defendants.

Jeffrey R. Adams, Esq.
ADAMS & MULL, PLLC
(For Defendant)

HEARING ON:
Oral Argument

NATURE OF PROCEEDINGS

COURT REPORTER
Holly Draper

START TIME: 10:08 a.m.

APPEARANCES: John Cundiff, Plaintiff
David Wilhelmsen, Counsel for Plaintiff
Donald Cox, Defendant
Catherine Cox, Defendant
Jeffrey Adams, Counsel for Defendants

The Court notes, the time is set for an Oral Argument on the Joinder of indispensable Parties issue. The Court has reviewed the Memorandum.

Counsel Wilhelmsen addresses the Court regarding the Court of Appeals' decision and the Memorandum and presents further argument on the issue.

Counsel Adams presents argument on the issue of joinder of indispensable Parties and the Court of Appeals' decision.

The Court discusses the declaratory action issue and notes that it has not reviewed all of the files to see whether or not an Amended Complaint was filed.

Counsel Adams addresses the Court regarding that issue and presents further argument.

Court notes, it has reviewed the Answer, and inquires if another Answer was filed that brings a counterclaim for declaratory action.

Counsel Adams notes that the declaratory action issue has not been raised in a counterclaim.

Counsel Wilhelmsen presents further argument on the declaratory judgment and the joinder issues.

For reasons as stated on the record, the Court **finds**, based upon rule 19(a), Arizona Rules of Civil Procedure, and the language of the Declaration of Restrictions, as well as the fact that it is Plaintiff's choice to bring this action, and the Defendants are simply defending and not bringing a separate action, counter-claim, or cross-claim to invalidate the Declaration, that it is appropriate to **ORDER** that the Plaintiff shall join all landowners subject to the Declaration of Restrictions dated June 12, 1974.

IT IS ORDERED that within 60 days of today's date, the Plaintiff shall file a notice with this Court that includes a map of the properties subject to the Declaration of Restrictions as well as a list designating the parcel numbers as well as names and address of each property owner.

The Court advises that upon filing that notice, the Plaintiff shall also file a plan for joinder of all the property owners subject to the Declaration of Restrictions. The Defendants shall have the time provided by the Rules to file a response or objection to Plaintiff's notice and designation of plan. The Court will proceed based upon that plan, as well as the Defendants' response or objection.

The Court discusses the possibility of the matter being more suited to a class action and whether or not the additional Parties should be added as Plaintiffs or Defendants. The Court will give the Plaintiff the opportunity to make a determination on that issue.

Counsel Wilhelmsen inquires how to bring the matter to the Court's attention as a class action matter.

The Court advises, if the matter is to be brought as a class action matter, it needs to be in accordance with the Rules of Civil Procedure.

The Court **does not find**, given that these are property owners for property in Yavapai County, that the designation of those additional Parties would deprive this Court of jurisdiction.

Court and Counsel Wilhelmsen discuss what the Court would like to see in terms of the plan for joinder.

END TIME: 10:51 a.m.

1 Mark W. Drutz, #006772
2 Jeffrey R. Adams, #018959
3 Sharon Sargent-Flack, #021590
4 **MUSGROVE, DRUTZ & KACK, P.C.**
5 1135 Iron Springs Road
6 Prescott, Arizona 86305
7 (928) 445-5935

8 Attorneys for Defendants

9 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**

10 **IN AND FOR THE COUNTY OF YAVAPAI**

11 JOHN B. CUNDIFF and BARBARA C.
12 CUNDIFF, husband and wife; BECKY NASH,
13 a married woman dealing with her separate
14 property; KENNETH PAGE and KATHRYN
15 PAGE, as Trustee of the Kenneth Page and
16 Catherine Page Trust,

17 Plaintiffs,

18 v.

19 DONALD COX and CATHERINE COX,
20 husband and wife,

21 Defendants.

Case No. CV 2003-0399

Division No. 1

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' LEGAL MEMORANDUM
RE JOINDER UNDER RULE 19 OF ALL
COYOTE SPRINGS RANCH
PROPERTY OWNERS SUBJECT TO
RECORDED COVENANTS, JUNE 13,
1974**

(Assigned to the Honorable David L.
Mackey)

(Oral Argument Requested)

22 Defendants, through counsel undersigned, hereby respond to Plaintiffs' Legal Memorandum
23 Re Joinder Under Rule 19 of All Coyote Springs Ranch Property Owners Subject to Recorded
24 Covenants, June 13, 1974 ("Plaintiffs' Memo"). Review of Plaintiffs' Memo reveals that Plaintiffs
25 failed to meet their burden, which according to the Court's August 23, 2007 Order, was to establish
26 that (i) joinder of the absent owners is not feasible and (ii) this case should proceed based upon the
27 factors set forth in Rule 19(b), Ariz. R. Civ. P. Because Plaintiffs failed to meet their burden, this
28 Court must either (i) order the joinder of the absent Coyote Springs Ranch property owners

NOV 02 2007
F! S. Sargent-Flack
D. W.

1 (“Affected Owners”) or (ii) dismiss this case on the basis that the Affected Owners are
2 indispensable. This Response is supported by the following Memorandum of Points and Authorities,
3 the Memorandum Decision issued by the Court of Appeals and the Court’s August 23, 2007 Order,
4 the Court’s Notice Setting Briefing Schedule and Oral Argument (“**August 23 Order**”), and the
5 record on file, each which shall be incorporated by reference.
6

7
8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. Introduction.**

10 On the issue of joinder of the Affected Owners, the Court of Appeals held specifically that
11 (i) the Defendants’ Motion to Join Indispensable Parties Pursuant to Rule 19(a), Ariz. R. Civ. P., or,
12 in the Alternative, Motion to Dismiss Pursuant to Rule 12(b)(7), Ariz. R. Civ. P., (“**Defendants’**
13 **Joinder Motion**”) was well founded and supported by Rule 19(a), Ariz. R. Civ. P., (ii) that the
14 Declaration of Restrictions at issue constitute property rights which run with title to the land owned
15 by the Affected Owners, (iii) that a ruling in this case in Defendants’ favor on the issue of
16 abandonment would affect the real property rights of the Affected Owners and (iv) that the Affected
17 Owners are necessary parties to this case as long as (a) they are subject to service of process and (b)
18 their joinder will not deprive the trial court of jurisdiction. See Memorandum Decision at ¶¶ 29, 32,
19 35 and 36. As a result, the Court of Appeals ordered this Court to determine, on remand, whether
20 the Affected Owners are also indispensable under Rule 19(b), Ariz. R. Civ. P. Id. at ¶ 36. Following
21 receipt of the Memorandum Decision and the parties arguments following the Defendants’
22 submission of their proposed Judgment on Mandate, this Court ordered Plaintiffs to establish that
23 “joinder is not feasible and that the Court should proceed with this action based upon the factors set
24 forth in Rule 19(b), Ariz. R. Civ. P.”, which provides:
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26
27
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1 If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the
2 court shall determine whether in equity and good conscience the action should
3 proceed among the parties before it, or should be dismissed, the absent person being
4 thus regarded as indispensable. The factors to be considered by the court include:
5 first, to what extent a judgment rendered in the person's absence might be prejudicial
6 to the person or those already parties; second, the extent to which, by protective
7 provisions in the judgment, by the shaping of relief, or other measure, the prejudice
8 can be lessened or avoided; third, whether a judgment rendered in the person's
9 absence will be adequate; fourth, whether the plaintiff will have an adequate remedy
10 if the action is dismissed for nonjoinder.

11 Notwithstanding the foregoing Order of this Court, Plaintiffs have failed to establish either (i) that
12 the joinder of the Affected Owners is not feasible or (ii) that the action should proceed based upon
13 the factors set forth above in Rule 19(b), Ariz. R. Civ. P.

14 **II. Plaintiffs Have Failed To Establish That Joinder Of The Affected Owners Is**
15 **Not Feasible.**

16 Surprisingly, Plaintiffs have completely ignored the Court of Appeals' decision and the
17 August 23 Order of this Court. Instead of following the Court of Appeals' decision and the
18 August 23 Order, Plaintiffs have continued to argue that the Affected Owners are not necessary
19 parties to this action. Plaintiffs have failed to address the first mandate of this Court's August 23
20 Order by establishing that joinder of the Affected Owners is not feasible.

21 In their memorandum, Plaintiffs assert that joinder of the Affected Owners is not necessary
22 under Rule 19(a)(1) or (2), Ariz. R. Civ. P. In making this assertion, Plaintiffs propound three
23 arguments. First, Plaintiffs argue that the Affected Owners are unnecessary under Rule 19(a)(1),
24 Ariz. R. Civ. P., because (i) this Court can grant complete relief in this case as to the present parties
25 and (ii) the Affected Owners have not expressed any interest in this case. See Plaintiffs' Memo at
26 6:15-6:21. Second, Plaintiffs argue the Affected Owners are unnecessary under Rule 19(a)(2)(ii),
27 Ariz. R. Civ. P., because the Defendants will not be subject to any risk of any later inconsistent
28

1 obligations. See Plaintiffs' Memo at 7:1-8:14. Third, Plaintiffs argue that the Affected Owners are
2 unnecessary under Rule 19(a)(2), Ariz. R. Civ. P., because Defendants "have not advanced any
3 'legally protected interest' claimed by [the Affected Owners] that relates to the subject matter of the
4 litigation." See Plaintiffs' Memo at 8:15-21. Unfortunately for Plaintiffs, the Court of Appeals
5 already definitively resolved the issue of the necessity of joinder of the Affected Owners under Rule
6 19(a)(1) and (2), Ariz. R. Civ. P.

7
8
9 In its Memorandum Decision, the Court of Appeals ruled that the outcome of this case could
10 significantly affect each of the Affected Owners and each of their respective real property rights by
11 potentially creating a patchwork of restrictive covenants. In this regard, the Court stated:

12
13 "Restrictions as to the use of land are mutual, reciprocal, equitable easements
14 in the nature of servitudes in favor of owners of other lots within the restricted area,
15 and constitute property rights which run with the land." *La Esperanza Townhome*
16 *Ass'n, Inc. v. Title Sec. Agency of Ariz.*, 142 Ariz. 235, 238, 689 P.2d 178, 181 (App.
17 1984) (quoting *Montoya v. Barreras*, 473 P.2d 363, 365 (N.M. 1970). A ruling in
this case that the restrictions have been abandoned and are no longer enforceable
against the Coxes' property would affect the property rights of all other owners
subject to the Declaration.

18 Memorandum Decision at ¶ 32 (emphasis added).

19
20 [E]ven if a ruling in favor of the Coxes on their affirmative defense of
21 abandonment were to apply only to the Coxes' property, all property owners rights
22 would still be affected by the Coxes' continued use of their property, or by any future
23 use adverse to the restrictions. We have previously found that amendments to
24 covenants must apply to all property subject to them or not at all. *See La Esperanza*
Townhomes, 142 Ariz. at 238, 689 P.2d at 181; *Riley v. Boyle*, 6 Ariz.App. 523, 434
25 P.2d 525, 528 (1967). Similarly, ruling in favor of the Coxes in this case could
cause the same unintended "patchwork" of restrictions those cases sought to
avoid.

26 Memorandum Decision at ¶¶ 35 (emphasis added). Following the foregoing analysis, the Court
27 unequivocally determined that the Affected Owners are necessary parties to this case.
28

1 Because the Court of Appeals has ruled already that the Affected Owners are necessary
2 parties to this case, all that is left to determine is whether their joinder is feasible, i.e., whether the
3 Affected Owners are subject to service of process or whether the joinder of the Affected Owners will
4 deprive this Court of jurisdiction over this case. Because Plaintiffs have failed to meet their burden,
5 not Defendants', in proving either that (i) the Affected Owners are not subject to service of process¹
6 or (ii) the joinder of the Affected Owners would divest this Court of jurisdiction, the Affected
7 Owners must be joined accordingly or this case must be dismissed.
8
9

10 **III. Plaintiffs Have Failed To Establish That This Action Should Proceed Under**
11 **Rule 19(b), Ariz. R. Civ. P., Absent Joinder Of The Affected Owners.**

12 Rule 19(b), Ariz. R. Civ. P., provides that the factors to be considered in determining whether
13 an action should proceed should persons deemed necessary to an action under Rule 19(a), Ariz. R.
14 Civ. P., are not joined. Those factors include (i) to what extent a judgment rendered in the person's
15 absence might be prejudicial to the person or those already parties; (ii) the extent to which, by
16 protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can
17 be lessened or avoided; (iii) whether a judgment rendered in the person's absence will be adequate;
18 and (iv) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.
19
20 See Rule 19(b).
21
22

23
24 ¹The Affected Property Owners could either be personally served or served by publication
25 since Plaintiffs' action is *in rem*. The Court of Appeals stated as follows:

26 However, "the court decides who is an indispensable party after it finds that the party
27 is necessary but cannot be joined." [citation omitted] No evidence was presented
28 below that the other property owners could not be joined if necessary.

See Memorandum Decision at ¶30, fn. 2.

1 In this case, Defendants have asserted that the restrictive covenants at issue have been
2 abandoned. If the Court rules that the Declaration of Restrictions has been abandoned, the restrictive
3 covenants contained therein will, at a minimum, be unenforceable against these Defendants by
4 Plaintiffs herein and also by all of the Affected Owners. As a result, Defendants would be free to
5 continue their use of their property over any future objections by any other Affected Owner thereby
6 stripping all of the Affected Owners of valuable property rights that exist by virtue of the restrictive
7 covenants. See La Esperanza Townhome Ass'n, Inc. v. Title Sec. Agency of Ariz., 142 Ariz. at 238,
8 689 P.2d at 181. This certainly would prejudice the Affected Owners property rights. The result
9 would be the creation of a "patchwork" of restrictions within the Coyote Springs Ranch subdivision
10 that clearly was not intended when the Declaration of Restrictions was created. In fact, Division One
11 of the Court of Appeals has already deemed such an outcome unacceptable given the Arizona case
12 law.
13

14
15
16 There is no question that the Court of Appeals already has determined that a judgment
17 rendered in Defendants' favor would, without question, result in prejudice, harm and a loss of
18 substantive real property rights by all other Affected Owners. If this case were to proceed without
19 the Affected Owners and the Defendants prevail, no effort to shape the relief to be granted by this
20 Court could ever be adequate; nor could such relief ever operate to provide the Affected Owners with
21 any remedy for the harm caused or any consolation for their lost rights. If, on the other hand, this
22 Court were to dismiss this case due to non-joinder of the Affected Owners, Plaintiffs still would have
23 an adequate remedy because they would retain the opportunity to bring an new action in the future
24 and with the involvement and participation of all owners in the subdivision and in which they could
25
26
27
28

1 seek the Court's declaration that the Declaration of Restrictions is valid and enforceable as to all
2 Affected Owners or that it has been abandoned and thus not enforceable by any Affected Owner.

3
4 It is clear that Plaintiffs are unhappy with the Court of Appeals' decision on the issue of
5 joinder of the Affected Owners. However, they did not file a Petition for Review to the Arizona
6 Supreme Court. Hence, Plaintiffs (and this Court) must following the Court of Appeals' decision
7 that the Affected Owners are necessary parties to this case.

8
9 Further, it was Plaintiffs' burden, not Defendants,² to establish, given the factors set forth in
10 Rule 19(b), Ariz. R. Civ. P., that joinder is not feasible nor warranted, the Affected Owners being
11 "regarded as indispensable." Plaintiffs have failed to meet their burden in providing this Court with
12 any basis upon which to conclude that the Affected Owners should not be joined when considering
13 and applying the factors articulated in Rule 19(b), Ariz. R. Civ. P. Plaintiffs certainly have not
14 demonstrated that the joinder of the Affected Owners is not feasible. Consequently, this Court must
15 either (i) order joinder of the Affected Owners as they are necessary parties or (ii) dismiss this case.

16
17
18 **IV. Conclusion.**

19 Plaintiffs had a mandate from this Court following its August 23 Order – namely to establish
20 (i) that joinder of the Affected Owners is not feasible and (ii) establish why this case should proceed
21 without joinder of the Affected Owners considering the factors set forth in Rule 19(b), Ariz. R. Civ.
22

23
24 ²On the issue of who holds the burden as it applies to the argument of joinder of the Affected
25 Owners, Plaintiffs actively have sought, in their memorandum, to shift that burden to Defendants.
26 In Plaintiffs' Memorandum, Plaintiffs stated not less than 14 times that Defendants have failed to
27 meet their burden in establishing why the Affected Owners should be joined. This was despite the
28 fact that this Court determined that it is Plaintiffs' burden and obligation to demonstrate why, given
the factors set forth in Rule 19(b), the Affected Owners should not be joined. This is important
because much to the chagrin of Plaintiffs, the Court of Appeals already has established that the
Affected Owners are necessary parties to this case and that they should be joined if they can be.

1 P. In response to that Order, Plaintiffs have not met their burden. While Plaintiffs have argued that
2 the Affected Owners are unnecessary, the Court of Appeals has already settled that issue. Plaintiffs
3 did not address the issue of the feasibility of joinder of the Affected Owners. Consequently, we are
4 left to assume that they concede that joinder is feasible. Plaintiffs also have failed to appeal, dispute
5 or rebut the Court of Appeals' conclusion that without the joinder of the Affected Owners, a ruling
6 in this case in Defendants' favor will unequivocally and dramatically affect the legal and real
7 property rights of each and every Affected Owner in an irreparable way regardless of the manner in
8 which this Court were to fashion Defendants' relief. Consequently, this Court must either (i) order
9 joinder of the Affected Owners as they are necessary parties or (ii) dismiss this case.

10
11
12 RESPECTFULLY SUBMITTED this 2 day of November, 2007.

13
14 MUSGROVE, DRUTZ & KACK, P.C.

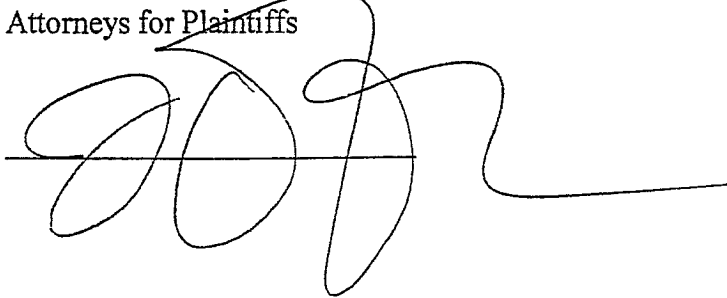
15
16 By 

17 Mark W. Drutz
18 Jeffrey R. Adams
19 Sharon Sargent-Flack
Attorneys for Defendants

20 COPY of the foregoing hand-delivered
21 this 2 day of November, 2007, to:

22 Honorable David L. Mackey
23 Yavapai County Superior Court
24 Division 1
25 Yavapai County Courthouse
26 Prescott, Arizona 86301
27
28

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A handwritten signature in black ink, appearing to read 'DW', is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.